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NATIONAL CONTROL OVER ELECTION OF SENATORS.

MAY 22, 1911.—Ordered to be printed.

Mr. SUTHERLAND, from the Committee on the Judiciary, submitted the following

VIEWS OF THE MINORITY.

[To accompany H. J. Res. 39.]

The undersigned members of the Senate Committee on the Judiciary dissent from the action of the committee in reporting favorably House joint resolution 39 on the following grounds. The resolution as reported is as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (*two-thirds of each House concurring therein*), That in lieu of the first paragraph of section three of Article I of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, and in lieu of all of paragraph one of section four of said Article I in so far as the same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for Senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

This contains two separate and distinct amendments to the Constitution. The first is an amendment to section 3 of Article I so as to provide for the direct election of Senators by the people. The second is an amendment of section 4 of Article I so as to destroy the power which the National Government now has to regulate and direct the time and manner of electing members of its own Senate.

The fourth section of the first article now reads as follows:

The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

This provision requires the State legislatures in the performance of a duty under the National Constitution to regulate the times and man-

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ner of holding elections both for Senators and Representatives, and gives the National Congress power at any time by law to make or alter such regulations.

Under this provision it was clearly contemplated that the authority to prescribe the times, places, and manner of holding elections for Representatives and Senators should primarily vest in the State legislatures, but that the ultimate power to make or alter such regulations should forever remain in the hands of the Federal Government. It is manifest that the framers of the Constitution intended that this supervisory power on the part of Congress should exist independently of the way in which the Members of Congress should be elected. Representatives, under the Constitution, are now elected by the people; Senators are elected by the various legislatures, but in both instances the authority of Congress to regulate the election is preserved.

There would seem to be no doubt that if the Constitution had originally provided for the popular election of Senators as it did for the election of Representatives, provision would have been made for the supervisory control by Congress over such elections just as it is now provided with respect to elections by the legislatures.

The resolution as reported leaves the duty of the State legislatures and the power of Congress the same so far as Representatives are concerned, but, so far as Senators are concerned, it strikes out the words which empower the Congress at any time by law to make or alter the regulations, and it thus transfers from the National Congress to the State legislatures the power of control over the election of Senators which the National Government now has and has had since the beginning of the Government, and which it has and will continue to have over the election of Representatives.

The resolution also makes another change in section 4 which will be important in determining the construction of the instrument and the nature of the powers to be exercised by the State legislatures. The present provision is a command to the State legislatures to prescribe the times, places, and manner of holding elections, subject to the ultimate authority of Congress. In performing that function the State legislatures are discharging a duty under the Constitution of the United States, acting by its authority. The proposed amendment inserts the word "as" before the word "prescribed" and makes the provision read:

> The times, places, and manner of holding elections for Senators shall be *as* prescribed in each State by the legislature thereof.

The command to the State legislatures is thus taken out of the Constitution, and the legislatures in making such regulations as they see fit to make will be performing no duty imposed upon them by the Constitution of the United States, but exercising, according to their own will and pleasure, an authority to which the Government of the United States will be subjected.

As to these proposed changes in section 4 of Article I we consider:

First. That they are unnecessary to accomplish the purpose of securing the direct election of Senators by the people. They do not aid or contribute to the direct election of Senators in any manner or degree. There is no reason why the ultimate authority of the National Government over the times and manner of electing Senators by direct, popular vote should not continue to be exercised just as it always has been exercised over the direct election of Representatives by popular vote. The exercise of that national power over the popular election

of Representatives meets now with no objection and, under the proposed amendment, is to continue. The proposed change from legislative election of Senators to popular election of Senators furnishes no reason whatever for destroying the ultimate power of control over the election of Senators which the National Congress now has under the Constitution.

Second. The abandonment of national authority by the proposed changes in section 4 would be a fundamental and vital change in our system of government and should be regarded as far more important than the change from legislative to direct election of Senators to which it has been attached in the resolution reported as if it were merely incidental and subordinate. The present provision contained in section 4 of Article I was adopted by the framers of the Constitution after full discussion and upon great consideration. The conclusion expressed in the section as adopted was an assertion of the ultimate authority of the National Government over the steps necessary to constitute the Government and to insure its continued exercise and power to act. It was one of a series of provisions which established definitely the distinction between the old confederation under which the central government was dependent upon the States and the new National Government, which was to contain within itself every element of power essential to its continued existence and effectiveness. The proposed change would reverse that conclusion, would change the theory and the nature of the relations between the National Government and the several States, and would leave the Nation dependent upon the several States and without authority of its own in respect of an essential part of the machinery necessary to its continued existence.

How vital is the preservation of the supervisory power conferred upon Congress by section 4 of Article 1 was strongly set forth by the Supreme Court of the United States, through Mr. Justice Miller, delivering the opinion in the Yarbrough case (110 U. S., 651). In that case the Supreme Court was passing upon the validity of the Federal election law of 1870, an act based upon the authority conferred by the first clause of section 4 of Article I. We quote from the opinion as follows:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this Government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption.
>
> If it has not this power it is left helpless before the two great natural and historical enemies of all republics—open violence and insidious corruption. * * *
>
> It is as essential to the successful working of this Government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption.
>
> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular election, the temptations to control these elections by violence and by corruption is a constant source of danger. * * *
>
> If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned

by corruption or controlled by violence and outrage, without legal restraint, then indeed is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it are at the mercy of the combinations of those who respect no right but brute force on the one hand and unprincipled corruptionists on the other.

The Senate of the United States and the House of Representatives constitute one of the three great departments of the Federal Government upon whose existence and efficiency the very life of the Nation depends. To say that one branch of this department shall be in the absolutely uncontrolled power of the various State governments is to deny the supremacy of the Federal Government and to that extent make it subordinate to the government of the several States. No matter what laws the State governments may pass regulating the time and manner of the election of Senators, no matter how profound may be the effect of such laws upon the efficiency of the Senate, the Federal Government, if this resolution shall be finally adopted, will be utterly powerless to protect itself. It would seem that the mere statement of such a contingency, however remote its happening may appear to be, should be sufficient to prevent its adoption. No harm can possibly result from a continuation of the supervisory power in the hands of Congress, while infinite harm might follow its destruction.

Third. That possession by the National Government of the power of control over the election of its own legislative bodies is a matter of practical concern is shown by the fact that it has been found necessary to exercise that control in the past regarding both branches of the National Legislature. It was found necessary to regulate the election of Representatives by a national statute passed in 1842 and by further statutes in 1872, under which those elections are still held, and it was found necessary to regulate the legislative proceeding for the election of Senators by national statute in 1866. The Federal election law of 1870 and the subsequent amendments of that law were based upon this provision of the Constitution. No one can tell when the further or renewed exercise of that power may be of the highest importance to the National Government. A moment's reflection will indicate that the greatest inconvenience and possibility of abuse might grow out of a variety of regulations in the different States fixing different times and ways of electing Senators in the absence of any power in the National Government to require a general and harmonious system throughout the States.

But it is not requisite to show how the exercise of the power will be necessary in the future. It rests upon those who wish to destroy the power to show that there can be no need of it in the future. This has not been and can not be successfully attempted.

Fourth. It is not proposed to disturb the power which section 5 of Article I of the Constitution confers upon each House of Congress to "be the judge of the elections, returns and qualifications of its own members." That power is essential. It must rest somewhere, and under our system, which separates the judicial and legislative branches, it can rest nowhere but in the legislative bodies themselves. It has been exercised by the House of Representatives in respect to the popular election of its members in more than 400 cases during the 122 years of the Government's existence. The continuance of the power to regulate the time and manner of holding elections, which it is proposed to strike out from section 4 of Article I, is necessary to enable the Houses of Congress to perform the duty of judging of the elections and returns

of their members. In order to perform that duty Congress must have the power to require that elections shall be held at such times and in such manner that there shall be competent and sufficient evidence available to enable the judging body to get at the truth and secure a basis for a just judgment.

Fifth. Possession of the power which it is proposed to strike out from section 4 is essential to enable the National Government to act effectively in case it should ever have occasion to enforce the provisions of the fourteenth and fifteenth amendments to the Constitution. The basis of any enforcement of those provisions must necessarily be the ascertainment and establishment of the facts in respect of the elections to which they may relate. The proposed amendment of section 4 of Article I, if adopted, would be the latest expression of the sovereign will of the people of the United States, and would take away from the National Government authority to make those regulations regarding elections which are essential to the preservation of evidence regarding what actually occurs.

There may be a difference of opinion as to whether the fourteenth and fifteenth amendments should remain in the Constitution, but it surely can not be thought consistent with the dignity and honor of the United States to leave them in the Constitution and at the same time surrender the power which would be necessary for their enforcement.

Sixth. The proposed amendment of section 4 depriving the United States of its authority over the ultimate control of the election of the members of its Senate has not been demanded or sought by the people of the United States. It has had no general discussion or consideration by them. It has had no general discussion or consideration in Congress. It has been proposed and reported as if it were an incident to another amendment to which it bears no necessary relation; as if it were a light and trifling matter; and no just basis exists upon which the Senate of the United States can now take the grave and serious step of proposing it to the State legislatures.

Seventh. It has been contended by some that even if the provision of the Constitution conferring upon Congress the authority to regulate the times and manner of the election of Senators shall be eliminated, full power will still exist under other general provisions. We are unable to agree with this contention. Under the resolution express power is granted to the States to regulate this subject. The language is exclusive; the whole power is granted to the State, and nothing whatever upon this subject is reserved to Congress. To expressly grant exclusive power over the subject to the State governments is equivalent to a denial of the same power to the General Government, and nothing can be clearer than that such express and exclusive grant would foreclose the General Government from exercising the same power under any general language contained in the Constitution.

It has been suggested that the right to vote for a Member of Congress is a right guaranteed by the Federal Constitution, and that Congress would therefore have the implied power to pass any regulation necessary to preserve this right. It is to be observed, however, that the power to regulate the time and manner of the election of Senators is to be *specifically* granted to the State legislatures, and it is difficult to understand how an *implied* power can exist in one agent to do a thing under general language where the identical power has been specifically and in exclusive terms granted to another.

The resolution now before the Senate is an exact copy of the joint resolution reported by Representative Tucker, of Virginia, in the Fifty-second Congress. Mr. Tucker, who was an able lawyer, in the course of his report stated:

> It is proposed to abrogate and annul the above [referring to clause 1, section 4] in so far as it gives to Congress any control, absolute, or remote and contingent, over the election of United States Senators by substituting the following language for so much thereof as refers to the election of Senators: "The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof."

Here is a plain, straightforward, candid statement of one of the great lawyers of the country, who knew precisely what he desired to accomplish, that the effect of this portion of the resolution is to annul clause 1 of section 4, as far as it gives Congress any control "absolute, or remote and contingent," and in the opinion of the minority members of the committee Mr. Tucker's view of the matter is entirely correct. If the proposed change in the language of clause 1 of section 4 does not have this result and does not have the effect to deprive Congress of its power in the premises, we are somewhat at a loss to understand what its proponents who take this view seek to gain.

Eighth. The two proposed amendments ought to be considered separately, and each upon its own merits. The existing tendency toward the direct election of Senators by the people ought not to be made a vehicle or pretext for getting the approval of Congress to an entirely separate and distinct proposal, to destroy Federal control over elections. The people of the country ought not to be compelled to approve, through their legislatures, a change which they may not desire as the price of securing another change which they may desire. In order to prevent this unfair and injurious treatment of the subject, we recommend that the resolution be amended to read as follows:

JOINT RESOLUTION [Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (*two-thirds of each House concurring therein*), That in lieu of the first paragraph of section three of Article I of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

C. D. Clark.
Knute Nelson.
William P. Dillingham.
George Sutherland.
Frank B. Brandegee.
Elihu Root.

May 22, 1911.

FURTHER VIEWS OF MESSRS. DILLINGHAM, BRANDEGEE, AND ROOT.

The undersigned, who have joined in the foregoing expression of views regarding the amendment of section 4 of Article I of the Constitution, wish also to put upon record an expression of their opinion that the amendment of section 3 of Article I so as to provide for the direct election of Senators by the people instead of by the State legislatures is inexpedient and unnecessary. We think that the change would be injurious rather than beneficial and that the abuses which have led to the proposal of the amendment can be obviated by a simple act of legislation, without any amendment to the Constitution. A bill for that purpose (S. 123) is now pending in the Senate.

WILLIAM P. DILLINGHAM.
FRANK B. BRANDEGEE.
ELIHU ROOT.

MAY 22, 1911.

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